Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revocation of License of	)	
	)	PR Docket No. 92-119
SANDRA V. CRANE	)	
Amateur Radio Station	)	
N6TFO	)	
	)	
and	)	
	)	
Suspension of License of	)	
	)	
SANDRA V. CRANE	)	
Amateur Extra Class	)	
Radio Operator License	)	
	)	
and	)	
	)	
Revocation of License of	)	
	)	
CHARLES P. PASCAL	)	
Amateur Radio Station	)	
WB6CTY	)	
	)	
and	)	
	)	
Suspension of License of	)	
	)	
CHARLES P. PASCAL	)	
Amateur Extra Class	)	
Radio Operator License	)	

To: Administrative Law Judge Joseph Chachkin

BUREAU'S REPLY TO EAJA APPLICATION

The Chief, Private Radio Bureau, by his attorneys, submits the Bureau's Reply to the respondents' Equal Access to Justice Act (EAJA) Application[1] which was filed and served on November 4, 1992. The Bureau, in reply, argues

[1] "Request for Award Under Equal Access to Justice Act."

under the EAJA that the respondents were not "prevailing parties" in this proceeding, that the Bureau's position in this matter was "substantially justified," and that the respondents' fee documentation contains irregularities and insupportable charges. The Bureau therefore respectfully requests that the Application be dismissed.

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SUMMARY OF ARGUMENT

Respondents' Equal Access to Justice claim should be dismissed because they were not "prevailing parties" in this proceeding. The proceeding was terminated by a Consent Order embodying a settlement between the Bureau and respondents. Under the terms of settlement the respondents agreed to significant enforcement sanctions, including one that the Bureau could have obtained only through settlement.

Furthermore, the position of the Bureau was "substantially justified." Undisputed facts -- indeed, admissions by each respondent -- show that the Bureau was substantially justified in seeking license revocation/suspension against each. It is undisputed that on August 4, 1991, Pascal administered a Morse code test that included one of two sentences he had taught to his students the same day and that he announced before the test that it would include one of the two sentences. His supplying his students in advance with sufficient information about the content of the test to pass it is a violation of Section 97.17(e) of the Rules which provides, "No person shall ... assist another person to ... attempt to obtain [an amateur license] by fraudulent

means." It is undisputed that Crane administered amateur examinations to her daughter, in violation of Section 97.515(d), three times. License revocation/suspension are appropriate sanctions. Disputed facts concerning examinations on August 4 and 24 and September 14 bolster the Bureau's substantial justification.

Finally, if respondents' claim is paid, it must be reduced. Their supporting documentation is incomplete and contains irregularities and reflects charges above the $75 per hour limit set by the Commission's Rules and the EAJA.

ARGUMENT

I. BECAUSE RESPONDENTS ARE NOT "PREVAILING PARTIES" UNDER THE EAJA, THEIR APPLICATION MUST BE DISMISSED.

A. In light of the settlement terms, respondents are not entitled to EAJA fees because they are not "prevailing parties."

Only "prevailing part[ies]" are entitled to attorneys' fees under the EAJA. 5 U.S.C. § 504(a)(2).[2] The Commission's Rules permit an award when an applicant has prevailed in "a proceeding, or ... a significant and discrete substantive portion of a proceeding." Section 1.1505(a), 47 C.F.R. § 1.1505(a). On the facts of the present case, it strains logic to view respondents as having "prevailed." Under the terms of the settlement,[3] respondents agreed to significant enforcement sanctions, including one that

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[2] See Dunn v. U.S., 842 F.2d 1420, 1433 (3rd Cir. 1988) (case under 28 U.S.C. § 2412); H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 4984. There are two EAJA statutes: 5 U.S.C. § 504, applicable in administrative agency proceedings, as here, and 28 U.S.C. § 2412, applicable in court proceedings.

[3] Consent Order FCC 92M-987 (rel. Oct. 1, 1992).

the Bureau could have obtained only through settlement.

The respondents' argument reduces to this: The Bureau sought license revocation but settled for a three month suspension.[4] This analysis fails, however, when viewed in the light of what the Bureau had sought through its Order to Show Cause and Suspension Order (OSC)[5] in this enforcement proceeding, and what it achieved by settling the action.

The OSC specified these issues:

(a) To determine whether the respondents willfully or repeatedly violated Section 97.17(e) of the Rules in connection with examinations administered on August 4, August 24 or September 14, 1991, or on any combination of these dates.

(b) To determine whether respondent Sandra V. Crane willfully or repeatedly violated Sections 97.17(e), 97.515(d), or 97.517 or any combination of these sections, of the Commission's Rules in connection with examinations administered on November 12, 1990, January 6, 1991, or April 12, 1991, or on any combination of these dates.

(c) To determine whether respondent Charles P. Pascal willfully violated Sections 97.17(e) or 97.517, or both, of the Commission's Rules in connection with an examination administered on November 12, 1990.

(d) To determine whether each respondent is qualified to remain a Commission licensee.

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[4] Respondents also state: "Prior to the hearing in this proceeding, respondents offered to take an even greater suspension if the Bureau would not press for revocation. Yet the Bureau pressed on for revocation without any substantial evidence of fraudulent intent on the part of the respondents." The Bureau believes it is inappropriate to discuss actual settlement negotiations, because such an approach is contrary to the free exchange of offers, and can therefore discourage settlement negotiations. Even if respondents' "prevailing party" status could, as they assume, be determined by comparing their actual settlement with a settlement more favorable to the Bureau, respondents could not be "prevailing parties" because under either version respondents' operator licenses would be suspended for a period of time, respondents would be permanently barred from being VEs, and respondents would be prevented in some fashion from choosing the "contact" volunteer examiners (VEs) for examinations conducted in association with their school.

[5] 7 FCC Rcd 2698 (Spec. Serv. Div. 1992).

(e) To determine whether one or both of the captioned radio station licenses should be revoked.

(f) To determine whether the suspension of each of the captioned operator licenses should be affirmed, modified, or dismissed.[6]

Although not specified in the OSC, also at issue was whether the respondents could remain eligible to be Volunteer Examiners (VEs) within the Volunteer Examiner Coordinator (VEC) and Novice Class testing systems, a privilege both respondents had exercised in the past.[7] Therefore, as possible sanctions, the Bureau sought from each respondent: 1) station license revocation, 2) operator license suspension, and 3) as a result of either of the above, permanent revocation of VE eligibility. Here, a factual point deserves elaboration -- the notion, implied in respondents' Application, that amateur station and operator licenses can somehow be separated in an analysis of the outcome of this proceeding. To the contrary, both licenses must be valid concurrently for either to be of any use to the holder.[8] Respondents therefore cannot be said to have prevailed on any of the sanctions listed above.

Any settlement would have had to be "less" of a sanction than revocation.[9] Respondents are not "prevailing parties" under the EAJA simply

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[6] Under the Communications Act the Bureau may seek only the suspension (and not the revocation) of operator licenses. 47 U.S.C. § 303(m).

[7] See Resp. Ex. 2, pp. 1-2; Resp. Ex. 1, p. 5. Section 97.515(c) of the Commission's Rules, 47 C.F.R. § 97.515(c), provides: "No person may be a VE if that person's amateur station license or amateur operator license has ever been revoked or suspended."

[8] See 47 C.F.R. §§ 97.5 , 97.7, and 97.9.

[9] That is, had adverse findings at hearing resulted in the revocation of the respondents' station licenses, it would necessarily have followed that the respondents' operator licenses would have been suspended and the permanent VE disqualifications would have taken effect. (An individual may reapply for a

because the Bureau settled and thus necessarily agreed to terms not including license revocation. Although the Bureau agreed to a lesser penalty than it originally sought, the agreed-upon enforcement sanction is sufficient to rebut the argument that respondents "prevailed."

In addition to the suspension and permanent VE disqualification the respondents agreed to

> the establishment of a "wall" between their teaching functions and the selection of volunteer examiners (VEs) to test their students. The VEs who administer examinations in conjunction with classes taught by or with the assistance of either respondent or in conjunction with classes at any radio school that either respondent is affiliated with must be selected by a "contact" VE designated by the American Radio Relay League (ARRL) or another Volunteer Examiner Coordinator having no affiliation with the respondents and approved by the Commission. Neither the respondents nor anyone connected with any school that the respondents are affiliated with shall have any role in selecting the "contact" VE or the administering VEs.[10]

This term meets the Bureau's concern that no future irregularities occur in conjunction with tests given at the same location at which respondents teach (or even at a school with which they might be affiliated). It imposes restrictions on them while meeting their concern that they not be placed at a competitive disadvantage vis-a-vis other schools that give examinations "on-site." This provision could not have been obtained by the Bureau except by settlement and shows how settlement negotiations can be used to fashion unique, reasonable solutions for both sides to a dispute.

Last, it is axiomatic that the law looks with favor upon settlements,

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new station license one year after revocation. 47 C.F.R. § 1.916.)

[10] Consent Order at 3, para. 3(f).

as the Commission recognizes in its consent order rules.[11] In the present case, the parties attempted reasonably to settle claims amenable to settlement, and succeeded. This cannot mean that respondents "prevailed" within the meaning of the EAJA. Dame & Sons Construction, 292 NLRB 1044 (1989) (attached) is an EAJA settlement case in which the EAJA applicant/employer had only paid an employee $800 while the union withdrew all unfair labor practice charges, a representation petition and any claim to a collective bargaining agreement. The Administrative Law Judge held that the employer was not a prevailing party under 5 U.S.C § 504(a)(2), stating:

> The agreement represents a compromise in which there is something for everyone. The charges were withdrawn as an element of a compromise, not as a unilateral release of the Applicant from all obligations claimed in the complaint. The Applicant incurred financial responsibilities that it would not have had if the complaint had been dismissed. Furthermore, the settlement precludes finding that either the Government or the Applicant won or lost.

Id. at 1045.[12] In the present case, where the Bureau and respondents agreed to significant enforcement sanctions, including one obtainable only through settlement, the Bureau respectfully requests that the respondents be found not to have "prevailed" within the meaning of the EAJA, 5 U.S.C. § 504(a)(2).

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[11] Section 1.93, 47 C.F.R. § 1.93, provides: "Where the interests of timely enforcement or compliance, the nature of the proceeding, and the public interest permit, the Commission, by its operating Bureaus, may negotiate a consent order with a party to secure future compliance with the law in exchange for prompt disposition of a matter subject to administrative adjudicative proceedings." See also 47 C.F.R. § 1.18 (implementing alternative dispute resolution procedures, which include settlement negotiation); Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976)("It hardly seems necessary to point out that there is an overriding interest in settling and quieting litigation.").

[12] Cf. SEC v. Comserv Corp., 908 F.2d 1407, 1409, 1412-13 (8th Cir. 1990) (Comserv did not prevail where it consented to an injunction against future securities law violations, while neither admitting nor denying past violations) (case under 28 U.S.C.§ 2412).

B. Respondents, In Their Initial Application, Have Failed To Meet Their Statutory Burden of Proving That They Are "Prevailing Parties" Under the EAJA.

The EAJA, as well as Section 1.1511 of the Commission's Rules,[13] requires that respondents "show" in their initial Application that they are "prevailing parties" and therefore entitled to receive EAJA costs and fees. The respondents' statutory showing, in its entirety, is the following:

> Respondents substantially prevailed in this case. The Bureau had sought revocation of the respondents' licenses. Ultimately a consent order was approved whereby the respondents agreed to only a three month suspension of their licenses retroactive to August 1, 1992. The consent order did not waive the respondents' rights under the EAJA. Prior to the hearing in this proceeding, respondents offered to take an even greater suspension if the Bureau would not press for revocation. Yet, the Bureau pressed on for revocation without any substantial evidence of fraudulent intent on the part of the respondents.[14]

It is respondents' burden to demonstrate adequately that they have prevailed.[15] This five-sentence, conclusory paragraph is clearly inadequate under the statute to show that they prevailed in the underlying action.

Because the respondents' initial Application is deficient on this point, under the EAJA the Application must be dismissed because the required showing is jurisdictional.[16] That is, an applicant cannot, under the statute, remedy

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[13] 5 U.S.C. § 504(a)(1); 47 C.F.R. § 1.1511(a).

[14] Application at 3, para. 5.

[15] Dunn v. U.S., 842 F.2d 1420, 1432-33 (3rd Cir. 1988) (case under 28 U.S.C. § 2412).

[16] The EAJA provides, at 5 U.S.C. § 504(a)(2) (emphasis added):

> A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement .... The party shall also allege that the position of the agency

an insufficient application following the initial thirty-day filing period. Because the present Application contains a deficient jurisdictional showing, the Bureau respectfully requests that the Application be dismissed.

II. BECAUSE THE BUREAU'S POSITION IN THE PROCEEDING WAS "SUBSTANTIALLY JUSTIFIED," RESPONDENTS' APPLICATION MUST BE DISMISSED.

A. "Substantially Justified."

Under the EAJA and the Commission's Rules implementing the EAJA, "[a] prevailing applicant may receive an award ... unless the Administrative Law Judge determines that the position of the Commission over which the applicant has prevailed was substantially justified." Section 1.1505(a) of the Rules, 47 C.F.R. § 1.1505(a). See 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A). The Supreme Court has ruled that "substantially justified" under the EAJA means a standard of reasonableness and not more. Pierce v. Underwood, 487 U.S. 552, 563-568 (1988). The Supreme Court said this standard was satisfied if there is a "genuine dispute," "if reasonable people could differ as to [the appropriateness of the contested action]," (citations omitted), if "justified to a degree that could satisfy a reasonable person," or if there is a

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was not substantially justified.

Respondents must "show" that they are "prevailing parties"; it is not enough that respondents merely place the Bureau on notice generally about their position. This requirement is procedurally akin to the eligibility requirement pertaining to an applicant's net worth, see, e.g., United States v. Hopkins Dodge Sales, Inc., 707 F.Supp. 1078, 1080 (D.Minn. 1989)("Nothing in the language of [EAJA Section 2412(d)(1)(B)] or its legislative history suggests that a defective application which is not completed until after the 30 day limit has run is any less fatal to a court's jurisdiction than a late filed application. Indeed, the requirement of showing eligible status is contained in the same sentence as the 30 day filing requirement."); see also Columbia Manufacturing Corp. v. NLRB, 715 F.2d 1409 (9th Cir. 1983) (Application was filed three days late). Thus, the "prevailing party" showing is a threshold requirement without which an application cannot go forward -- any defects in the Application on this point cannot be cured by a later reply.

"reasonable basis both in law and fact" (citations omitted). Id at 565. The Supreme Court noted that "a position can be justified even though it is not correct, and ... it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." Id at 566 n.2.[17] See also Trahan v. Brady, 907 F.2d 1215, 1217-1218 (D.C. Cir. 1990).

The Supreme Court's ruling on the meaning of "substantially justified" in Pierce v. Underwood, arising under 28 U.S.C. § 2412(d)(1)(A), applicable in court proceedings, applies equally to the identical language in 5 U.S.C. § 504(a)(1), applicable in administrative agency proceedings such as this case. See Quality C.A.T.V., Inc. v. NLRB, 969 F.2d 541, 544 (7th Cir. 1992); M.P.C. Plating, Inc. v. NLRB, 953 F.2d 1018, 1021 (6th Cir. 1992); Kuhns v. Bd. of Governors of the Federal Reserve System, 930 F.2d 39, 43 (D.C. Cir. 1991).

In applying the reasonableness standard to the case at hand, it should be noted that this revocation/suspension proceeding involved amateur licenses -- that is, licenses to engage in the hobby of amateur radio. Nothing resembling a loss of livelihood is involved. To prevail on the merits, the Bureau needed only prove its case by a preponderance of the evidence and would not have been held to a "clear and convincing" standard. Sea Island Broadcasting v. FCC, 627 F.2d 240, 244 (D.C. Cir. 1980). The record does not indicate whether the California Amateur Radio School was Pascal's and Crane's main source of livelihood or merely an after hours occupation; even if it were their primary source of income, an amateur license is not needed to

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[17] The Supreme Court rejected a stricter standard -- "slightly more" than reasonable -- previously applied by the District of Columbia Circuit. Id at 567.

conduct classes to prepare applicants for amateur examinations. The Commission does not regulate such classes; it regulates the administration of examinations and processes applications.[18]

B. The Record and Additional Supporting Documents in this Proceeding Demonstrate that the Bureau was "Substantially Justified" in its Position.

Turning to the specifics of this case, the Order to Show Cause and Suspension Order (OSC), 7 FCC Rcd 2698 (Spec. Serv. Div. 1992) specified these issues:

(a) To determine whether the respondents willfully or repeatedly violated Section 97.17(e) of the Rules in connection with examinations administered on August 4, August 24 or September 14, 1991, or on any combination of these dates.

(b) To determine whether respondent Sandra V. Crane willfully or repeatedly violated Sections 97.17(e), 97.515(d), or 97.517 or any combination of these sections, of the Commission's Rules in connection with examinations administered on November 12, 1990, January 6, 1991, or April 12, 1991, or on any combination of these dates.

(c) To determine whether respondent Charles P. Pascal willfully violated Sections 97.17(e) or 97.517, or both, of the Commission's Rules in connection with an examination administered on November 12, 1990.

(d) To determine whether each respondent is qualified to remain a Commission licensee.

(e) To determine whether one or both of the captioned radio station licenses should be revoked.

(f) To determine whether the suspension of each of the captioned operator licenses should be affirmed, modified, or dismissed.

1. The Bureau's Position was Substantially Justified Based on Undisputed Facts.

Even if only undisputed evidence is considered the Bureau has met its

[18] Respondents can no longer act as unpaid Volunteer Examiners because they accepted license suspensions in their settlement, pursuant to Section 97.515(c) of the Rules, 47 C.F.R. § 97.515(c).

burden of showing substantial justification for this proceeding. It is undisputed that on August 4, Pascal (not one of the VEs, as the rules require) administered a Morse code test, that the test included one of two sentences he had taught to his students the same day and that he announced, before the test, that it would include one of the two sentences (Resp. Ex. 1, p. 7). (This also violated Section 97.507(a) and (e) of the Rules.) Despite Pascal's claim that his advance announcement was a regrettable slip of the tongue, it is nonetheless undisputed that he proceeded to test on one of the taught sentences (rather than generating a different sentence). Pascal's admissions establish that he supplied his students, in advance, with sufficient information about the content of the Morse code test to pass it.[19] By tipping his students off, he left no doubt about his intent. It should be noted that the Morse code requirement is considered a considerable barrier by many would-be amateurs, even those who would feel confident of their ability to study and pass the written examination. See Report and Order in PR Docket No. 90-55 (No Code), 5 FCC Rcd 7631, 7631-7632 (1990). The undisputed irregularities in this code test -- that Pascal, not a VE, administered it, that it consisted of a short segment of material that Pascal taught and advised the class would be the test -- provide substantial justification for the Bureau's position that Pascal violated Section 97.17(e) of the Rules on August 4.

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[19] An examinee can pass a 5 words per minute Morse code test by getting 25 consecutive characters correct (Maia Supp. Decl., pp. 4-5). The sentence taught by Mr. Pascal and included in the examination was: "The name is Tom and I am in Tennessee." (Bur. Ex. 1, p.4; Bur. Ex. 1, Att. 2). Because this sentence has at least 25 characters, it contains all the information needed to pass the test.

Pascal's admissions establish that he has willfully[20] violated section 97.17(e) of the Commission's Rules, 47 C.F.R. § 97.17(e), which provides, "No person shall ... assist another person to obtain or attempt to obtain an amateur license by fraudulent means." License revocation and suspension are appropriate sanctions for violation of this section. See Vincent J. Beard, 99 FCC 2d 247 (I.D. 1984), aff'd (Rev. Bd. 1984); and Nomar Vizcarrando et al., 4 FCC Rcd 1432 (Priv. Rad. Bur. 1989). Therefore, it is clear that the Bureau meets the substantial justification standard with respect to Pascal.

Crane has admitted that, acting as a volunteer examiner, she tested her own daughter, Tracy Gullotti, on November 12, 1990, January 6, 1991, and April 12, 1991 (Resp. Ex. 2, p. 1-2. See also Sandra Y. Crane's Response to the Bureau's Request for Admission of Facts). This constituted a repeated and willful violation of Section 97.515(d) of the Commission's Rules, 47 C.F.R. § 97.515(d), which provides that "No VE may administer an examination to that VE's spouse, children, grandchildren, stepchildren, parents, grandparents, step parents, brothers, sisters, stepsisters, stepbrothers, aunts, uncles, nieces, nephews and in-laws." Respondent's counsel claims that a $500 monetary forfeiture was imposed in a prior enforcement case involving violation of Section 97.515(d) but did not identify the case. The Bureau has not found any case in which a forfeiture was imposed for violation of Section 97.515(d), but in any event the Bureau has discretion to seek revocation of a hobby license as an alternative to imposing a substantial monetary forfeiture

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[20] The Communications Act provides, "The term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any [Commission rule]." 47 U.S.C. § 312(f)(1).

on an individual licensee.

In this particular situation, it was appropriate for the Bureau to seek license revocation/suspension for Crane's three violations of Section 97.515(d) alone. A requirement that prohibiting VEs from examining their relatives is important to the integrity of the VE system. Furthermore, if anyone should know the amateur rules, including Section 97.515(d), it is a person such as Crane who operates a school that teaches the rules. Crane's willful violation on three distinct occasions of this important provision is obviously a significant matter. At the very least, a reasonable person could take the position that these violations form a basis for license revocation. This meets the "substantial justification" standard of Pierce v. Underwood, supra.

2. Disputed Facts Add to the Bureau's Substantial Justification.

While undisputed facts -- indeed admissions by each respondent -- show that the Bureau was substantially justified in seeking license revocation/suspension against each, substantial justification for the Bureau's position need not be established by undisputed facts. The Supreme Court has said that the reasonableness standard is satisfied if there is a "genuine dispute" or if "reasonable people could differ as to [the appropriateness of the contested action]." Pierce v. Underwood, supra, at 565. When disputed facts are considered, the Bureau's position is even stronger.[21]

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[21] In addition to exhibits that were admitted into evidence, the Bureau has obtained additional declarations from Christine F. McElwain, Fred Maia, and Steve Sternitzke. These contain testimony concerning the operation of respondents' classes, the VE system of administering amateur examinations, the software used to generate W5YI examinations, the Amateur Auxiliary program and related matters that could have been elicited if this matter had gone to hearing. Copies are attached.

The Bureau's chief complaining witness was Christine F. McElwain. Respondents dispute much of her testimony. This disputed testimony provides additional substantial justification for the Bureau's position. Throughout the course of this proceeding, which ended in a settlement, Consent Order, FCC 92M-987 (rel. Oct. 5, 1992), McElwain appeared to be a credible witness with no reason to lie (McElwain Supp. Decl. p. 2). As shown below, the testimony of McElwain and other Bureau witnesses establishes a prima facie case that the respondents willfully violated Section 97.17(e) of the Commission's Rules on August 4, August 24 and September 14, 1991. Because the Bureau need not show that it would have prevailed, this is more than sufficient to provide substantial justification for the Bureau's position.

According to McElwain, she was approached at a social occasion by David Morse, whom she knew slightly and who she knew to be an "official observer coordinator" (OOC) with the Amateur Radio Relay League (ARRL). He told her that as OOC he had received complaints alleging the sale of amateur licenses. He wanted to clear up these rumors and asked whether she would be interested in helping determine whether licenses were being sold. Later, after she agreed to help, he told her he had received complaints about Robert Flores' amateur school and respondents' California Amateur Radio School (CARS). McElwain had never heard of Flores, Pascal or Crane. Morse did not identify the complainants or the details of the complaints or express an opinion about the validity of the complaints. It was her understanding that Morse wanted her to participate in the investigation with an open mind and no preconceptions (McElwain Supp. Decl., p. 2). McElwain attempted, without success, to enroll in Flores' school; she was able to enroll in CARS (McElwain Supp. Decl. 3). This account accords with her testimony in

respondents' deposition (Aug. 4, 1992, pp. 36 - 70).

August 4

It is undisputed that, on August 4, 1991, McElwain attended a CARS Class at Crane's home. Pascal, assisted by Crane, taught the class. Following the class, a team of volunteer examiners (VEs) administered an examination to the students (Bur. Ex. 1, p. 3).

As pointed out above, Pascal's admissions establish that, by teaching a sentence that he then included in the Morse code examination and by tipping his students off in advance, Pascal willfully violated Section 97.17(e) of the Rules. While Pascal's admissions establish his violation, McElwain's testimony further elucidates Pascal's intent. According to her, Pascal tipped off his students during the instruction (not just before the test, as Pascal claimed) that the examination would contain one of the following sentences: "The train is not at the station," and "The name is Tom and I am in Tennessee" (Bur. Ex. 1, p. 3). Furthermore, Pascal taught only 22 (11 letters of the alphabet, 10 digits and the period) of the 43 characters that a Morse code test is required to contain[22] and claimed that this was sufficient preparation (Bur. Ex. 1, p. 3). McElwain's testimony makes Pascal's fraudulent intent crystal clear. Pascal contends his intent was not fraudulent (Resp. Ex. 1, p. 7). While this claim is difficult to believe, the Bureau need not prove it false to establish substantial justification. It is sufficient if there is a "genuine dispute."

McElwain says she took notes during the August 4 class (Bur. Ex. 1, p. 3 and Proposed Att. 1) on virtually every topic Pascal and Crane covered except

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[22] See Section 97.501(a) of the Commission's Rules, 47 C.F.R. § 97.501(a).

for material covered in the hand-outs she was given (McElwain Supp. Decl., p. 3); 24 (96%) of the 25 questions on the element 3A examination she took that day (Bur. Ex. 1, Att. 3) can be answered from her notes or the hand-outs (McElwain Supp. Decl. pp. 3-4). The notes and hand-out, however, include information sufficient to answer only 37.8% of the 325 questions contained in the Element 3A Question pool (Bur. Ex. 1, p. 4; Bur. Ex. 4, Atts. 46A and 46B; Bur. Ex. 1, Proposed Att. 4; McElwain Second Supp. Decl., p. 2).

The examination element 3A (designated H901) that McElwain and eleven others took on August 4 was prepared by Steve Sternitzke using W5YI Group software (Maia Supp. Decl. p. 2). Both Fred Maia and Sternitzke assert that the W5YI Group software randomly selects questions from the question pool (Maia Supp. Decl. p. 2; Sternitzke Decl. p. 2). Respondents needed advance knowledge of the exam to teach information sufficient to answer 96% of the questions on the exam but only 37.8% of the questions in the pool from which the questions are randomly selected. The discrepancy between 96% and 37.8% is too large to occur by chance. Thus the Bureau was substantially justified in concluding that Pascal and Crane had access to element 3A test H901 and that they used that information to tailor the content of their course in willful violation of Section 97.17(e) of the Rules. Respondents dispute this, but to show substantial justification, the Bureau need only show that its position is substantially justified by the credible testimony of its own witnesses; it need not show that this testimony would prevail over respondents' contradictory testimony.

August 24

It is undisputed that on August 24 McElwain again attended a CARS class at Crane's home. Pascal, assisted by Crane, taught the class.

Following the class a team of VEs administered an examination to the students (Bur. Ex. 1, pp. 5-6).

McElwain says the class was under way when she arrived at about 12:30 p.m. It continued until about 3:15 p.m. During the class Crane had, in front of her, three sets of examination questions (for examination elements 2 and 3A). Pascal told Crane to "keep all three tests there and make notes on anything I miss." Crane said, "We just got the tests last night. They just got reviewed." During the class, Pascal would ask Crane whether he had gotten something right or for the wording of the examination questions. In response, Crane provided information about the exact wording of examination questions and pointed out key words for the class to remember (Bur. Ex. 1, pp. 5-6). This strongly suggests that the papers Crane had in front of her were the questions they expected to be used during the examinations following the class. Otherwise, there would be no reason to give such emphasis to those questions. Respondents claim that the sets of questions were only "sample tests" (Resp. Ex. 1, p. 6; Resp. Ex. 2, p. 2). While this seems unlikely, the Bureau need not prove it false to establish substantial justification. There need only be a "genuine dispute" for the Bureau's position to be substantially justified.

According to McElwain the VEs arrived empty-handed for the examination session; Crane handed them a sealed package, which contained the examination materials (Bur. Ex. 1, p. 6). This would indicate that the exams were already in Crane's house and available to respondents to aid them in teaching and ensuring the applicants would pass. This conclusion is bolstered by McElwain's evidence that they taught the answers to all 55 questions on the exams she took that day (Bur. Ex. 1, Atts. 9 and 10; Bur. Ex. 1, p. 6;

McElwain Supp. Decl. p. 4) while covering only 41.6% of the questions in the Element 2 Question Pool and only 33.8% of the questions in the Element 3A Question Pool (Bur. Ex. 1, p. 6-7; Bur. Ex. 4, Atts. 46A and 46B; Bur. Ex. 1, Proposed Att. 11; McElwain Second Supp. Decl., p. 2). Respondents disputed this, providing evidence that the VEs had the exams when they arrived. (Respondents' Proposed Ex.: Fakehany Sept. 3, 1992 Decl., p.1). This was an issue in dispute that would have been resolved in the hearing, had it gone forward. The fact that it was disputed still meets the Supreme Court's test of a "genuine dispute." McElwain's evidence that the examiners arrived empty-handed provides substantial justification for the Bureau's position that respondents violated Section 97.17(e) on August 24.

September 14

On September 14 McElwain attended an examination session at which students of CARS were being examined. She took the 5 words per-minute Morse code examination (Element 2) and was the only examinee who did so at that session (Bur. Ex. 1, p. 7). According to McElwain, the tape recording used to administer that examination was in the examination room before the VEs arrived and Crane provided it to them. (Bur. Ex. 1, pp. 7-8; McElwain Supp. Decl., p. 5). Further, the test contained the following two sentences: "The name is Don and I am in Tennessee"; and "The train is not at the station." Except for changing "Tom" to "Don", these are the same two sentences that Mr. Pascal taught on August 4 (Bur. Ex. 1, p. 3). Crane's possession of the code test tape, which contained virtually the same two sentences that Pascal had taught, constitutes prima facie evidence that respondents, in violation of Section 97.17(e), arranged for McElwain to take a Morse code test whose content Pascal had revealed in advance. Although disputed by respondents, the Bureau's

position that respondents violated Section 97.17(e) in connection with the September 14 code test is substantially justified.

In summary, the Bureau's position, that respondents willfully assisted others to attempt to obtain amateur licenses by fraudulent means in violation of Section 97.17(e) and other rules was substantially justified, as was the license revocation/suspension sought. The Bureau's position was substantially justified even if only undisputed facts are considered. Disputed facts may be considered as well and add to the Bureau's substantial justification. Any one violation of Section 97.17(e) warrants license revocation/suspension. The Bureau had substantial justification concerning respondents' violations on several separate dates. Respondents' EAJA claim should therefore be dismissed.

Transcript

Although not relevant to respondents' EAJA claim, their request adverts to a controversy concerning the transcript of a portion of a tape recording made on September 14. Respondents' counsel had a copy of the tape recording obtained through deposition. The Bureau had offered as an exhibit a partial transcript of a conversation between respondents that took place just before the code test. The only purpose for offering the transcript was to show that respondents had prior knowledge of the contents of the code test tape. A few weeks before the prehearing conference counsel had discussed this transcript. Respondent's counsel expressed a concern that some material had been omitted from the conversation in question (as the transcript indicated by ellipses) that he felt should be included. He indicated that he intended to offer as his exhibit an alternate version which would include the missing material. The Bureau should have simply included the missing material to satisfy the

concern of respondents' counsel when it prepared its exhibit; instead it expected respondent's alternate version would place the material in the record. It must, however, be stressed that the Bureau did not intend to mislead respondents' counsel, nor could he have been misled. He had the tape himself and was at all times able to check the accuracy of the Bureau's transcript or make his own transcript.

To clear up any misunderstanding, the Bureau has provided a complete transcript of the transaction in question. The transcript (McElwain Supp. Decl., Att. 6) indicates that VE Michael Bryant maintained that the code test tape contained six V's after word "Novice," while respondents maintained there were not. The transcript of the code test that followed (as recorded by McElwain), which Bureau witness Walter Ramsey has confirmed is accurate, indicates that there are, in fact, no V's (Proposed Bur. Ex. 5, p. 4 and Att. 10). This shows that respondents were more familiar with the content of the code tape than was the VE. The transcript includes the previously omitted material in which Pascal says "Tom" was the source of his information about the content of code tape. Even if true, Pascal's remark is not exculpatory; only the VEs should have any knowledge about the content of the code test tape.

III. ASSUMING RESPONDENTS' CLAIM IS OTHERWISE VALID, RESPONDENTS' REQUESTED FEE AND OTHER EXPENSE AMOUNTS MUST BE REVISED DOWNWARD.

A. Because Respondents' Documentation Contains Irregularities and Insupportable Charges, Respondents' Claim Must Be Revised Downward.

First, respondents' Application includes, at Exhibits C and D, 15 pages of documentation of fees and other expenses by the law firm of Lukas, McGowan,

Nace & Gutierrez, Chartered, and 3 pages of documentation by the law firm of Barab and Hart. All documentation pages list hourly fee amounts in excess of the statutory maximum of $75 per hour, with only the two total amounts claimed ($ 12,544.62 and $ 6,122), as determined by the law firms and stated in the main body of the Application,[23] apparently complying with the statutory maximum. So that the Bureau could assess these claims adequately, the Bureau should have been given detailed documentation demonstrating billings consistent with the EAJA maximum fee. Certainly the law firms must have made certain calculations to arrive at the two total amounts cited above, yet the documentation for these calculations is absent.

Second, the Lukas, McGowan law firm listed itemized billings for Charles P. Pascal, and then apparently carried-over one-half of the total monthly amounts to arrive at billings for Sandra V. Crane. The law firm submitted in the Application only the Crane gross amount for September 1992 (billing date October 7, 1992), however, so the firm failed to submit any detailed ("Pascal") billings for the entire month of September 1992.

And third, the Bureau found the following discrepancies in the documentation concerning phone calls between the two primary counsel, Mr. Lyon and Mr. Barab:

Date	Lukas, McGowan	Barab and Hart
6-30-92	0.3 hours	2.5 hours
7-22-92	0.3	0.5
7-24-92	0.3	(no listing)
8-4-92	0.3	(no listing)
8-6-92	(no listing)	1.0

[23] Application at 2, para. 3.

8-7-92	0.3 (to Mr. Barab?)	1.0
8-27-92	0.3	(no listing)
9-10-92	(no Sept. statement)	0.5
9-16-92	(no Sept. statement)	0.5

In light of the above irregularities and insupportable charges, the Bureau respectfully requests that the claimed fees and expenses either be disallowed, or that the law firms be directed to provide adequate documentation of their charges. Also, the Bureau respectfully requests an opportunity to review any additional documentation that is required. Last, if the Presiding Judge awards EAJA fees and expenses to one respondent and not the other, the total award should be halved. The documentation respondents have submitted indicates that half the total bill accrued to each respondent's account.

B. **Any EAJA Fees Awarded May Not Exceed $75 Per Hour.**

Respondents have argued in the alternative[24] that any fees and expenses awarded should be calculated in light of increases in the consumer price index (CPI). This would result in an award based on fees at more than the $75 hourly rate specified in Section 1.1506 of the Commission's Rules. They state that under the EAJA, the FCC should reevaluate the $75 hourly rate based on a CPI increase of 62.4% between January 1, 1981, and September 1, 1992. This argument fails. If the claim of Pascal and Crane is paid, it can be paid at no more than $75 an hour. Section 1.1507 makes clear that the $75 limit can only be changed, prospectively, by rule making. See also Section

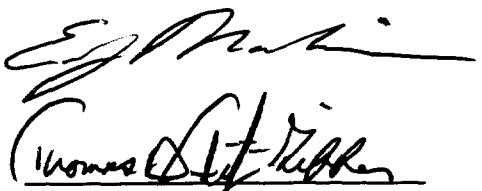
[24] Application at 2, note 1.

504(b)(1)(A) of the EAJA, 5 U.S.C. § 504(b)(1)(A).[25] Thus there is no authority under the Commission's Rules or the EAJA to order reimbursement at more than a $75 hourly rate based on inflation on a case by case basis.[26]

In light of the above, the Bureau respectfully requests that the Application be dismissed and, in the alternative, that the claimed fees and other expenses be reduced.

Respectfully submitted,

Ralph A. Haller
Chief, Private Radio Bureau

By: 

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Attorneys

Dated: December 4, 1992

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[25] No administrative agency has increased the rate above $75 per hour under Section 504(b)(1)(A) of the EAJA.

[26] It might further be noted, that while the EAJA first became effective October 1, 1981, it expired September 30, 1984. It was reauthorized in 1985 (Pub. L 99-80), with the $75 limit still in place. There is support for the viewpoint that, where an adjustment for inflation is appropriate, the starting date for increases should be 1986, when the 1985 enactment became effective. See Cassuto v. Commissioner, 936 F.2d 736, 742-3 (2d Cir. 1991); Bode v. U.S., 919 F.2d 1044, 1053 (5th Cir.) The D.C. Circuit, however, has ruled that the baseline date is October 1, 1981, the date the EAJA first became effective. See Hirschey v. FERC, 777 F.2d 1 (D.C. Cir. 1985); Wilkett v. ICC, 844 F.2d 867, 874-5 (D.C. Cir. 1988). These cases interpreted 28 U.S.C. § 2412, which applies in court proceedings and permits judicial revision of the $75 limit, unlike 5 U.S.C. § 504(b)(1)(A) and Section 1.1507, applicable here.